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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-918 (2)

CHARLES DUCK, Trustee of the Bankruptcy Estate of GEORGE M. JEWELL and LAURA E. JEWELL, and GEORGE R. JEWELL,

Petitioners,

v.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION,

Respondent.

No. 88-934 (2)

IRENE O'CONNELL KRUSE,

Petitioner,

v.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION,

Respondent.

OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL FIRST APPELLATE DISTRICT, DIVISION ONE

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Petitioners,

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No. 88-934

IRENE O'CONNELL KRUSE,

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v.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION,

Respondent.

OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL FIRST APPELLATE DISTRICT, DIVISION ONE

Respondent Bank of America N.T. & S.A.* ("the Bank") respectfully requests that this Court deny the petition for writ of

* Bank of America N.T. & S.A. owns less than a 100% interest in the following of its subsidiaries: Banco Colombo Americano, Bank of America Australia Limited, Bank of America S.A.E., Bank of America (France) S.A.,

(Footnote Continued)

certiorari filed by Charles Duck, bankruptcy trustee of the estate of George M. Jewell and Laura E. Jewell, and by George R. Jewell (the "Jewells") and the petition for writ of certiorari filed by Irene O'Connell Kruse ("Kruse"). Both petitions seek review of the opinion of the California Court of Appeal, First Appellate District, Division One filed on May 18, 1988, and modified on June 17, 1988.

STATEMENT OF THE CASE

On May 18, 1988, the California Court of Appeal issued its opinion in *Kruse v. Bank of America* (as later modified and reported at 202 Cal. App. 3d 38, 248 Cal. Rptr. 217 (1988)). That opinion reversed the trial court judgment in favor of petitioners. The decision was rendered by a panel composed of Justices John T. Racanelli, William A. Newsom and Norman Elkington.

The Court of Appeal found that Kruse and the Jewells had not established by substantial evidence the causes of action alleged in their pleadings. The decision to reverse the judgment was entirely based on established state law principles and did not raise any federal issues or constitutional questions.

Petitioners seek the aid of this Court by legal maneuvers aimed at creating a constitutional question where none in fact exists. Notably, petitioners' briefs contain only a sketchy account of the facts and procedures giving rise to the alleged constitutional questions—perhaps because those facts reveal the frivolous nature of the petitions.

1. Facts Underlying Petitioners' Claims Of Judicial Disqualification.

Petitioners first raised the issue of judicial disqualification *after* the Court of Appeal rendered its decision. While petitioners' motions for rehearing were pending before the Court of Appeal, Kruse filed a motion requesting that Justice Racanelli and Justice Newsom recuse themselves. Kruse claimed that,

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(Footnote Continued)

BA Servicios, S.A., East Kemptville Tin Corporation, and The Electronic Payments Exchange, Inc. Bank of America N.T. & S.A. is itself wholly owned by BankAmerica Corporation, all of the subsidiaries of which are wholly owned.

while the appeal was pending, Justice Racanelli owned Bank stock and Justice Newsom had a "customline" of credit with the Bank. The purported factual basis of those assertions was the belated recollection of Kruse's counsel that at an unrelated hearing involving the Bank in April 1986 Justices Racanelli and Newsom disclosed, respectively, stock ownership in and a loan from the Bank. After Kruse filed her motion for recusal, the Jewells immediately filed their own request based entirely on the declaration filed by Kruse's counsel.

Only days later, Kruse filed an additional brief raising more unsubstantiated accusations. This time Kruse theorized that Winslow Christian, the Bank's Director of Litigation, had recommended Justice Racanelli, Justice Elkington and Justice Newsom to be appointed to the Court of Appeal. Kruse also speculated that Justice Racanelli may have been influenced by a hope that Warren Christopher, the Bank's counsel who argued the appeal, might somehow obtain a federal judicial appointment for the Justice if Governor Dukakis won the presidential election. Appendix A. On June 17, 1988, the Court of Appeal declined petitioners' recusal requests as well as the petitions for rehearing, and the court issued its modified opinion making minor editorial changes.

Kruse and the Jewells then filed petitions for review in the California Supreme Court essentially requesting review of the Justices' refusal to disqualify themselves. Kruse also filed an application to take evidence on the disqualification issue. On June 30, 1988, Justice Racanelli submitted a declaration to the California Supreme Court establishing beyond dispute that he had never owned Bank stock. Appendix B. Obviously, that declaration put to rest the issue of Justice Racanelli's disqualification.[1]

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[1] By statute, a judge's ownership of less than 1% of a party's stock, or of such stock worth less than $1,500, is not a disqualifying interest. California Civil Procedure Code §§ 170.1(a)(3), 170.5(b). Justice Racanelli's Statements of Economic Interest filed pursuant to California Government Code § 87200 for the years 1986 and 1987 do not indicate any ownership of Bank stock. (Under California Government Code § 87203 appellate court judges are annually required to disclose their investments and income during the preceding year. The disclosure is made on "Form 721," the Statement of Economic Interest, issued by the Fair Political Practices Commission under authority of California Government Code § 83113.)

As to Justice Newsom's loan from the Bank, since the 1984 revisions to the California judicial disqualification statutes, a loan is no longer a disqualifying financial interest. California Civil Procedure Code Section 170.1; 2 B. Witkin, California Procedure, *Courts § 80 (3rd ed. 1985)*.[2] *See also* Code of Judicial Conduct, Canon 5C(4)(b) (a loan is not a disqualifying interest if obtained in the "regular course of business on the same terms generally available to persons who are not judges"). Since the evidence presented did not establish any ground for disqualification, the California Supreme Court denied petitioners' requests for review, as well as the application to take evidence, finding that petitioners had "not made a prima facie showing of conflict of interest or bias much less a deprivation of due process."

Faced with the absence of any basis in the record for disqualifying Justice Racanelli or Justice Newsom, Kruse now makes entirely new accusations concerning Justice Newsom. In her petition Kruse claims that David Flinn, the Bank's trial attorney in this case, is the family lawyer for Justice Newsom, and that this constitutes ground for disqualification. That again exemplifies petitioners' creation of innuendo without any factual basis.

As a threshold matter, we note that the alleged lawyer/client relationship between Justice Newsom and Flinn constitutes entirely new matter never raised below. Neither Justice Newsom nor the California Supreme Court has had an opportunity to consider that matter. To the extent this Court is inclined to consider it, however, the Bank wishes to correct Kruse's false allegations.

Kruse's conclusion that Flinn was Justice Newsom's attorney is simply not supported by the evidence on which Kruse relies. Her argument springs from two "facts": (1) Justice Newsom's apparent ownership of stock in Squaw Valley Improvement Corporation, as reflected in his 1982 Statement of Economic Interest, and (2) Flinn's representation of that corporation as reflected in its Statement of Domestic Stock Corporation filed with the California Secretary of State in June 1982. Kruse unjustifiably assumes from those two documents

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[2] Although Justice Newsom's Statements of Economic Interest revealing the existence of the creditline were available for inspection at all times, petitioners waited until after the Court of Appeal rendered its decision to raise the disqualification issue.

that Flinn represented the Corporation when Justice Newsom was one of its stockholders.[3] That assumption is wrong. In May of 1982, Justice Newsom, in an arms-length transaction, sold all his shares of Squaw Valley Improvement Corporation to two sisters and a brother. Appendix C.[4] In June of 1982, *after* the sale, Justice Newsom's sisters employed Flinn to dissolve the corporation. It was only after Justice Newsom's sale of shares that Flinn's law firm commenced representation of the corporation. Flinn is not and never has been counsel for Justice Newsom.[5] Appendix C.

2. The Facts Of The Case.

This case arose out of a complex lending relationship between the Bank, the Jewells and the O'Connell Company (of which Kruse was sole shareholder). The litigation commenced in 1981 when the Jewells and the O'Connell Company, faced with financial collapse, filed claims against the Bank alleging fraud, breach of the covenant of good faith and fair dealing and other torts. The California Court of Appeal, applying state law, found that petitioners did not establish at trial their claims of tortious conduct on the part of the Bank.

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[3] Even if Mr. Flinn had been Justice Newsom's lawyer, there would be no ground for disqualification under California Civil Procedure Code § 170.1. *See also Popkin v. Eastern Air Lines, Inc.*, 236 F.Supp. 645 (E.D. Pa. 1964). But if Kruse truly believes these allegations constitute a ground for disqualification, she should have raised that issue first with Justice Newsom himself by seeking to vacate the decision under California Civil Procedure Code § 473. *See Kaufman v. Court of Appeal*, 31 Cal. 3d 933, 184 Cal. Rptr. 302 (1982).

[4] Because the record contains no evidence on this new issue, the Bank proffers in the Appendix David Flinn's declaration explaining his involvement with Squaw Valley Improvement Corporation.

[5] Justice Newsom's name appears in the 1982 Statement of Domestic Corporation filed by Squaw Valley only in the prestamped address placed upon the document by the Secretary of State. Justice Newsom appears as the addressee of the form simply because the Secretary of State records for 1981 showed Justice Newsom's office as the "corporate office." Appendix C.

The complex facts underlying petitioners' original claims against the Bank are irrelevant to this Court's decision on the petitions for certiorari. Those facts raise no federal issues or questions of constitutional dimension. Suffice it to note that Kruse's statement of facts is quite misleading. For an accurate explanation of the underlying facts, this Court can look to the summary contained in the opinion of the California Court of Appeal, attached as Appendix A to Kruse's Petition for Certiorari.

REASONS FOR DENYING THE WRITS

1. The Judgment Below Is Not Final.

Under 28 U.S.C. Section 1257, Supreme Court review of state court decisions is available only with respect to "final judgments or decrees." This Court has often applied the precept that a decision reversing a case and remanding it for further proceedings is "totally wanting in the requisite finality required to support a writ of error from this court." *Cincinnati Street Railway Co. v. Snell,* 179 U.S. 395, 397 (1900). *See also O'Dell v. Espinoza,* 456 U.S. 430 (1982); *Gospel Army v. Los Angeles,* 331 U.S. 543 (1947). Here the Court of Appeal reversed the judgment, and that had the effect of remanding the case to the trial court for further judicial proceedings.[6] Accordingly, petitioners are not seeking review of a "final" judgment or decree.

Petitioners may argue that this Court has granted certiorari to review interlocutory decisions. Those grants, however,

[6] Pending before the trial court is the Bank's motion for immediate entry of judgment, or alternatively for summary judgment. The trial court's disposition of those motions will likely give rise to further proceedings in either the trial or appellate court in California.

represent the exception, not the rule. For review of an interlocutory decision, the case must fall under one of the four exceptions to the finality requirement articulated in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).

The petitioners do not even address the finality issue, much less assert any of the *Cohn* exceptions. Both Kruse and the Jewells, however, suggested to the trial court that the fourth *Cohn* exception applies to their situation.[7] That fourth exception permits interlocutory review when, among other things, (1) "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action" *and* (2) failure to consider the state court decision immediately "might seriously erode federal policy." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. at 482-483. Petitioners cannot establish either prerequisite.

Resolution of the questions presented here will not preclude further litigation. Disqualifying the justices who decided the instant case would only have the effect of remanding the case back to the California appellate courts. Moreover, immediate resolution is not required to prevent erosion of federal policy. As this Court stated in *Flynt v. Ohio*, 451 U.S. 619, 622 (1981), in applying the fourth exception, it is important that the "exception [should not] swallow the rule." This case gave rise to no state court opinion at all interpreting federal law which will seriously erode federal policy, much less to such a decision requiring immediate consideration by this Court. Not falling under the fourth or any other *Cohn* exception, petitioners' requests for review should be denied.

2. Petitioners Did Not Raise The Questions Presented In The State Court Proceedings.

Petitioners cannot satisfy the requirement that a substantial federal question must have been properly raised in the state court proceeding. *See, e.g., Webb v. Webb*, 451 U.S. 493, 494-

[7] Petitioners obtained a stay of proceedings in the trial court to pursue their petitions for certiorari. The Bank opposed the stay on the ground that this Court was not likely to issue a writ of certiorari because of lack of finality of the decision below. Petitioners filed a reply in which they suggested that the fourth *Cohn* exception applied.

498 (1981); *Hill v. California*, 401 U.S. 797, 805-806 (1971); *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969). The Jewells' Petition for Certiorari in this Court raises for the first time a due process issue under the Fourteenth Amendment. Never during the state court proceedings did the Jewells frame a federal constitutional question. The Jewell's Petition for Review in the California Supreme Court stated the question only as follows: "Should a decision in a landmark lender liability case be allowed to stand when the decision was wrongly decided by two justices who should have disqualified themselves?" Appendix D. As this Court has found, "[a]ll questions of judicial qualification may not involve constitutional validity." *Tumey v. Ohio*, 273 U.S. 510, 523 (1927). *See also Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 821 (1986).

In the court below, the Jewells did not brief or address the due process implications of the alleged disqualification issue. Their failure to do so waived their constitutional claim. *Chambers v. Mississippi*, 410 U.S. 284, 290-291 n.3 (1973); *Beck v. Washington*, 369 U.S. 541, 553, *reh'g denied*, 370 U.S. 965 (1962). Having failed to raise the constitutional issue before the California Supreme Court, the Jewells cannot now seek redress in this Court for any alleged due process violation.[8]

Likewise, Kruse's petition for certiorari raises an issue not presented in the state court proceedings: the alleged (but mistaken) "newly discovered" lawyer/client relationship between Justice Newsom and the Bank's trial counsel. Neither the California Court of Appeal nor the California Supreme Court had an opportunity to consider (much less resolve) the essential factual predicate of the question presented, and so this Court should not review the issue. *See Adickes v. S. H. Kress and Co.*, 398 U.S. 144, 158 n.16 (1970); *Killian v. United*

[8] The Jewells did not overcome this jurisdictional impediment by citing United States Supreme Court cases to the California Supreme Court on the disqualification issue. Such citations do not satisfy the jurisdictional requirement. *See Herndon v. Georgia*, 295 U.S. 441, 442-43 (1935); *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 107 S.Ct. Rptr. 1940, 1948 n.9 (1987). Neither do passing references to "constitutional dimensions" without actually briefing the constitutional point. *See Oxley Stave Co. v. Butler County*, 166 U.S. 648 (1897); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 159 n.5 (1980).

States, 368 U.S. 231, 243 (1961), *reh'g denied*, 368 U.S. 979 (1962).

3. **The Case Does Not Present Important Questions of Law.**

Kruse asserts that the case presents a question of first impression: the degree or kind of interest on the part of a judge which violates due process. The mere lack of a Supreme Court ruling on a question has never been recognized as a basis for the grant of certiorari. More importantly, Kruse's characterization of the questions presented as an issue of first impression is misleading.

As the Jewells recognize in their petition, on more than one occasion this Court has explained the relationship between the due process clause of the Fourteenth Amendment and judicial disqualification. In *Tumey v. Ohio*, 273 U.S. 510, 523 (1927), for example, this Court stated:

> All questions of judicial qualification may not involve constitutional validity. Thus matters of kinship, personal bias, state policy, remoteness of interest, would seem generally to be matters merely of legislative discretion. [citation omitted] But it certainly violates the Fourteenth Amendment, . . . to subject [a person's] liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case.

And more recently in *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 822 (1985), this Court, reaffirming settled principles, explained that:

> [W]hat degree or kind of interest is sufficient to disqualify a judge from sitting 'cannot be defined with precision.' [citation omitted.] Nonetheless, a reasonable formulation of the issue is whether the 'situation is one which would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true.' [citation omitted].

Kruse also contends that the court should decide the issue of the effect of disqualification of a single appellate justice when

the decision is rendered by a three judge panel. Whether or not this issue is one of first impression, this case is an inappropriate vehicle to review it because Kruse's claims of prejudice are predicated upon unsettled facts never raised below.

4. The Lower Court's Decision Does Not Conflict With Decisions Of This Court.

The Jewells, unlike Kruse, acknowledge that this Court has set forth the due process standards requiring judicial disqualification. They merely claim that the Court of Appeal did not follow those standards when it refused to disqualify Justices Newsom and Racanelli.

The refusal of Justices Newsom and Racanelli to recuse themselves comports with decisions of this Court. Recently this Court rejected the view that "the slightest pecuniary interest" constitutes a violation of the Due Process Clause. *Aetna Life Insurance Co. v. Lavoie,* 475 U.S. at 825-826 n.3. Instead, the Court held that recusal is required where there is "a direct, personal, substantial, pecuniary interest." Applying that principle leads to the inevitable conclusion that Justices Racanelli and Newsom did not violate the due process clause by refusing to disqualify themselves. Justice Racanelli has never owned any Bank stock and Justice Newsom's small creditline does not constitute "a substantial pecuniary interest" so as to cause the judge "not to hold the balance, nice, clear and true." *Aetna Life Insurance Co. v. Lavoie,* 475 U.S. at 822.

The Jewells suggest that the affidavits they filed questioning the justices' qualifications should suffice for recusal regardless of their truthfulness. Contrary to the Jewells' assertion, *Liljeberg v. Health Services Acquisition Corp.*, ____ U.S. ____, 108 S.Ct. 2194 (1988), does not support such a conclusion. In *Liljeberg* the trial judge in fact had a disqualifying interest in the litigation.[9] *Liljeberg,* 108 S.Ct. at 2196, 2203. The rule suggested by the Jewells would result in a clear abuse. Every losing appellant could disqualify appellate justices and vacate

[9] *Liljeberg* is also distinguishable in that it involved interpretation of 28 U.S.C. § 455 and not the due process clause of the Fourteenth Amendment.

an adverse decision by simply filing affidavits questioning the justices' qualifications. Under the rule proposed by the Jewells, the justices would have to recuse themselves regardless of the truthfulness of the allegation. Certainly the Court in *Liljeberg* did not intend to create such an artifice.

5. The Lower Court's Decision Neither Interprets Nor Applies Federal Law On Judicial Disqualification.

Both Kruse and Jewells seek certiorari because the Justices, in refusing to recuse themselves, relied on the California Supreme Court decision in *Kaufman v. Court of Appeal,* 31 Cal. 3d 933, 184 Cal. Rptr. 302 (1982), which, according to petitioners, wrongly interpreted federal law. *Kaufman* rejected the claim that a California appellate justice cannot decide the issue of his own disqualification. Instead, *Kaufman* held that an appellate justice in California should decide individually whether the facts require recusal, and that the higher court only determines whether bias rendered the appellate proceeding unfair.

Contrary to petitioners' position, *Kaufman* neither interprets nor applies federal law; instead, it establishes the California rule (which the court mentioned was comparable to the federal rule). This Court does not grant certiorari to review questions of state law. *See Agins v. City of Tibuoan,* 447 U.S. 255, 260-261 n.6 (1980); *Patterson v. Colorado ex rel. Attorney General,* 205 U.S. 454, 461 (1907).

Petitioners suggest that the *Kaufman* rule violates due process, but the federal practice is fully consistent with *Kaufman.* Faced with a motion for recusal federal appellate judges individually decide whether disqualification is required. In *Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of America,* 325 U.S. 897 (1944), Justice Jackson stated that it is "the responsibility of each Justice to determine for himself the propriety of withdrawing in any particular circumstances." Justice Jackson noted that the majority of the Court lacked the power to exclude any of its duly commissioned Justices from sitting or voting in any case. Almost thirty years later Justice Rehnquist, when faced with a motion for disqualification, individually decided the disqualification issue.

See Laird v. Tatum, 409 U.S. 824 (1972). In refusing to recuse himself, Justice Rehnquist considered and weighed facts within his own knowledge. Challenged for disqualification, federal circuit judges follow the same procedure. *See, e.g., MacNeil Bros. Co. v. Cohen*, 264 F.2d 186, 189 (1st Cir. 1959); *Martin-Trigona v. Gouletas*, 634 F.2d 354, 355 n.1 (7th Cir.) *cert. denied*, 449 U.S. 1025 (1980).

Petitioners misleadingly rely on cases like *Berger v. United States*, 255 U.S. 22 (1921), *United States v. Sibla*, 624 F.2d 864 (9th Cir. 1980) and *United States v. Gigax*, 605 F.2d 507 (10th Cir. 1979) for the proposition that a judge challenged for bias can only decide the legal sufficiency of the affidavit and not the truthfulness of the allegations. Those cases, however, involved a unique statutory procedure applicable only to trial judges. Under both federal and California law trial judges pass only upon the sufficiency of the affidavit. If the affidavit is sufficient, the judge must refer the matter to another judge for determination of the merits. *See* 28 U.S.C. § 144; Cal. Civil Proc. Code § 170.3.

6. **Alleged Error In The Lower Court's Decision Does Not Justify Review By This Court.**

The Jewells suggest error in the decision below without specifying the nature of the error. Jewell's Petition pp. 15-16. Kruse argues that the Court of Appeal erred by failing to review the case in light of the actual legal theories upon which she relied. Kruse's Petition at pp. 13, 17. Kruse's claim boils down to arguing that the court simply misinterpreted her position. While undoubtedly such a sentiment is shared by most unsuccessful appellants, it certainly does not justify review by this Court. As the Justices of this Court have explained:

> The Supreme Court is not, and never has been, primarily concerned with the correction of errors in lower court decisions . . . . The function of the Supreme Court is, therefore, to resolve conflicts of opinion on federal questions that have arisen among lower courts, to pass upon questions of wide import under the Constitution, laws, and treaties of the United States, and to exercise

> supervisory power over lower federal courts. If we took every case in which an interesting legal question is raised, or our *prima facie* impression is that the decision below is erroneous, we could not fulfill the Constitutional and statutory responsibilities placed upon the Court.

R. Stern, E. Grossman and S. Shapiro, *Supreme Court Practice* § 4.1, at 190-191 (6th ed. 1986), citing Address of Chief Justice Vinson before American Bar Association, September 7, 1949. *See also Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974). Petitioners' belief that the court below erroneously applied state law is not a proper ground for certiorari.

CONCLUSION

For all the foregoing reasons, petitioners' requests for certiorari should be denied.

DATED: December 22, 1988

Respectfully submitted,

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APPENDIX A

Civil No. A033064/A039161

COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION ONE

IRENE O'CONNELL KRUSE
Plaintiff, Respondent, and Cross-Appellant,

v.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION,
Defendant, Appellant, and Cross-Respondent.

Appeal from the Judgments of the
Superior Court of the State of California
County of Sonoma
Honorable Laurence K. Sawyer, Judge

PLAINTIFF-RESPONDENT AND CROSS-APPELLANT IRENE O'CONNELL KRUSE'S AMENDMENT TO REQUEST THAT THE JUSTICES OF DIVISION ONE GRANT REHEARING AND RECUSE THEMSELVES, AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF REQUEST

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Attorneys for Plaintiff, Respondent and Cross-Appellant Irene O'Connell Kruse

C. **The Relationship and Long Acquaintance Between the Members of the Court, and Counsel for the Bank, is a Factor to Be Considered on the Issue of Impartiality:**

Martindale-Hubbell discloses that Mr. Warren Christopher, a senior partner of O'Melveny & Myers, who argued the appeals for the Bank, and former Justice Winslow Christian of this Court, were law school classmates at Stanford, and members of the Law Review, graduating together in 1949. In 1959, Mr. Christopher became special counsel to Governor Brown, Sr. From 1964 through 1966, Winslow Christian was the executive secretary to Governor Brown, Sr., and we are informed and believe that in that position Mr. Christian recommended judicial appointments to the Governor, and one of the appointments made in 1964 by Governor Brown was the appointment of Justice Racanelli to the Santa Clara County Superior Court bench.

In 1966, Governor Brown appointed Winslow Christian and Norman Elkington to the Court of Appeal for the First Appellate District, and it is perhaps a reasonable inference that Winslow Christian, as executive secretary, recommended his own appointment, and the appointment of Justice Elkington. It thus appears to be a reasonable inference that both Justice Elkington and Justice Racanelli may have received their appointments to the Court of Appeal and the Santa Clara County Superior Court, respectively, as a result of recommendations by Mr. Winslow Christian.

Justice Racanelli was appointed to the Court of Appeal by Governor Brown, Jr., in 1977, and a year later Justice Newsom was appointed to the Court of Appeal by Governor Brown, Jr., in 1978. We have at this time no information as to whether former Justice Winslow Christian recommended, or played any role in the appointment of, Justices Racanelli and Newsom to the Court of Appeal, but we submit it would not be unreasonable to assume that former Justice Christian may have played some part in recommending the appointments of Justices Racanelli and Newsom to the Court of Appeal, in view of Mr. Christian's former position as executive secretary to Governor Brown, Sr. during which time he may have recommended the appointment of Justice Racanelli to the Superior Court bench in 1964.

In 1984, Justice Christian resigned from the bench, and accepted a position as Director of Litigation in the Office of the General Counsel of the Bank of America, and has maintained his offices in the headquarters of the Bank in San Francisco, since that time. As Director of Litigation of the Bank, Mr. Christian has been in direct charge of this case and these appeals, and it was Mr. Christian who undoubtedly selected his law school classmate Mr. Christopher, and his lawfirm O'Melveny and Myers, to act as appellate counsel for the Bank, in the briefing and argument of these appeals. The selection of Mr. Christopher makes it necessary for this Court to consider certain other facts, concerning political and governmental activity and experience of the members of this Court, and counsel for the Bank, in order to comply with the principle that "a judge faced with a potential ground for disqualification ought to consider how his participation in a given case looks to the average person on the street." (*United Farm Workers, supra*, 170 Cal.App.3d at 104). Those facts to be considered are as follows:

Mr. Christopher, for many years has been, and still is, very prominent and influential in Democratic party political circles, and has held state and federal governmental offices during Democratic administrations. As previously mentioned, he was special counsel to Governor Brown, Sr., in 1959. From 1961-1965, during the Kennedy and Johnson administrations, Mr. Christopher was legal counsel in the office of the Undersecretary of State. He was appointed as a United States Deputy Attorney General in 1967 during the Johnson administration, and served in that position until 1969, resigning then during the Republican Nixon administration. Mr. Christopher was appointed Deputy Secretary of State in 1977, during the Carter administration, and served until 1981, resigning then during the Republican Reagan administration.

Mr. Christopher is a member of the board of directors of First Interstate Bancorp., the parent company of First Interstate Bank. Mr. Christopher was Vice Chairman of Governor Brown Sr.'s commission on the Los Angeles Riots, 1965-1966, during the same time that former Justice Winslow Christian was executive secretary to Governor Brown, Sr. During the Ken-

nedy administration, Mr. Christopher was Chairman of the United States delegation to the U.S.-Japan Cotton Textile Negotiations in 1961, and during that same year attended the Geneva Conference on Cotton Textiles. During the Kennedy-Johnson administrations, Mr. Christopher was special representative of the Secretary of State for Wool Textile meetings, in London, Rome, Tokyo, during the years 1964-1965. From 1975 to 1977, Mr. Christopher was the chairman of the American Bar Association standing committee on the federal judiciary. (The foregoing information appears in the 1987-1988 edition of "Who's Who in American Law," at page 136).

In a reprint of a "Judicial Profile" dated October 6, 1981, originally published in the Los Angeles Daily Journal, and based on an interview with Justice Racanelli, it is stated:

> "... Racanelli's interest in judicial administration seems to be only a continuation of his interest in bar association work and party politics when he was an attorney. While in practice in Santa Clara County, Racanelli sat on the County Bar Association's Board of Directors and the County's Democratic Central Committee."

Further, in this Court's consideration of how Justice Racanelli's participation in these appeals looks to the average person on the street, we submit that there should be taken into consideration the comments of an attorney quoted in the same Judicial Profile, as follows:

> "... If Racanelli has been politically active in judicial administration, a few attorneys also claim he has been political in his decision-making. A deputy attorney general who handles civil work said he is 'much more suspicious of intrusion of political motives in what (Racanelli) does.'..."

Since January of 1981, Justice Racanelli has been the administrative presiding Justice of the Court of Appeal for the First Appellate District, charged with overseeing the operation of the entire appellate court in San Francisco. We submit that the average person on the street might reasonably conclude that it is a somewhat remarkable coincidence that Division One was assigned to handle the appeal in the *Sanchez-Corea v. Bank of*

America, and *In Re the Estate of Barberis* (i.e. *Barberis v. Bank of America*), and Division One was also assigned to handle the present appeals in *Kruse/Jewell v. Bank of America*. We submit the average person on the street might therefore reasonably assume that Justice Racanelli, as the administrative presiding Justice for this Court, may have had something to do with the assignment of those three appeals to Division One. The Bank of course prevailed on all three of those appeals in this Court, based upon an opinion by this Division in *Sanchez-Corea* that was identical, and a carbon copy, of the decision of this Division, on the present appeals, in that both *Sanchez-Corea* and the present appeals, this Division totally ignored the rules of appellate review, and did not view the evidence in the light most favorable to the prevailing party plaintiff that had recovered judgment against the Bank, and instead viewed the evidence in the light most favorable to the respondent Bank, and concluded that the evidence was insufficient to support the judgments against the Bank, and therefore reversed the judgments. In *Sanchez-Corea*, where the plaintiff was fortunate enough to obtain hearing in the Supreme Court, the Supreme Court applied the usual and proper standard and rules of appellate review, and in an opinion that presented a day and night difference and contrast to the opinion of this Division, held that there was abundant substantial evidence to support the judgment for fraud perpetrated upon the borrower-customer plaintiffs, by precisely the same Bank Regional Credit Office head (Timmerman) using precisely the same *modus operandi* as was used against Mrs. Kruse and the Jewells in the present case.

We submit that the average person on the street, aware of the foregoing facts, might reasonably assume that in participating in the decision on the present appeals, Justice Racanelli may have had difficulty putting completely out of his mind, the fact that his past very frequent assignments to sit pro tem on the Supreme Court, which apparently arose from his reputed close friendship with former Chief Justice Rose Bird, may well have ended, and that therefore, if Governor Dukakis is elected president, Mr. Christopher might be influential in obtaining for Justice Racanelli either appointment to the federal bench, or appointment to governmental position and post in a Dukakis administration.

We respectfully emphasize again, that the test to be applied by this Court is not whether in fact there is any such possibility of such events taking place; rather, the much more stringent test to be applied is whether the average person on the street might reasonably think that Justice Racanelli could consciously or subconsciously be influenced to favor the Bank in his decision on the present appeals, and public confidence in the integrity and absolute impartiality of the judiciary demands disqualification, where the average person on the street might entertain a reasonable doubt as to impartiality.

In summary, the three Justices comprising the panel that decided the present appeals, and reversed judgments totalling approximately $22 million against the Bank of America, were Justices Racanelli, Elkington and Newsom. Justices Racanelli and Newsom have in the past announced that they were disqualified to sit on a Bank of America appeal, because of stock ownership and loans. Despite this, it appears reasonable to assume that Justice Racanelli had some hand in the assignment to Division One, of three appeals involving the Bank of America, in all of which the Bank prevailed. Justices Racanelli and Elkington received appointments to the Superior Court and Court of Appeal, respectively, during the time that Mr. Winslow Christian was executive secretary to Governor Brown, Sr.. Mr. Christian was formerly a Justice of this Court, and thus a fellow Justice of Justice Elkington for 12 years, and Justice Racanelli for 7 years, and former Justice Christian has been the Director of Litigation for the Bank of America, handling these cases and appeals and Mr. Christian presumably selected Mr. Christopher and the O'Melveny firm, to act as appellate counsel for the briefing and argument, and Mr. Christopher has such political influence as to possibly be able to obtain appointments to the federal bench or positions in the federal government, for Justices Racanelli and Newsom, and possibly Justice Elkington, if Governor Dukakis is elected President. Lastly, Justices Racanelli and Newsom have failed to disqualify themselves or even to disclose their disqualification, to counsel on these appeals, and Justice Elkington though aware of the said disqualification of his fellow Justices, has failed to cause his colleagues to disclose their disqualification, or to act on his own initiative, to disclose their disqualification.

We submit that the average person on the street, knowing all of the foregoing facts, would entertain a reasonable doubt of the ability of Justices Racanelli, Elkington, and Newsom, to be completely impartial in the decision of these appeals, and that therefore, to avoid even the appearance of impropriety, as well as to comply with the Canons of Judicial Ethics governing disqualification, and to maintain the confidence of the public in the integrity and impartiality of the judiciary, all three Justices are disqualified, and must be considered disqualified.

APPENDIX B

First District
Division One

State of California
Court of Appeal
State Building-Civic Center
San Francisco

John T. Racanelli
Presiding Justice

June 29, 1988

Chief Justice Malcolm M. Lucas
Associate Justices
Supreme Court, State of California
State Building, Civic Center
San Francisco, Ca 94102

Re: Kruse v. Bank of America, S006208

A Motion to Take Evidence has been filed by Petitioner Kruse in conjunction with her pending Petition for Review in the above captioned matter. Said motion is based in part on the declarations of petitioner's counsel and two other declarants relevant to a claim of disqualification based on my alleged ownership of stock in the Bank of America.

I submit the enclosed declaration and attached exhibits with reference to said motion for the court's consideration.

Respectfully,

John T. Racanelli

DECLARATION OF JOHN T. RACANELLI

I, John T. Racanelli declare as follows:

1. I participated as a member of the panel of Division One of the First Appellate District that heard and decided the appeals in Kruse v. Bank of America. (A033064/A039161.)

2. The Petition for Review filed by Irene O'Connell Kruse on June 27, 1988 (S006208) contains allegations essentially similar to those presented to the Court of Appeal in her petition for rehearing that I was disqualified because of an asserted ownership of stock in the Bank of America.

3. In a companion Motion to Take Evidence, petitioner Kruse has submitted declarations from William M. Lukens, Calvin F. Gunn and Dolly Ares attesting that on April 29, 1986, I stated in open court before an argument that I owned stock in the Bank of America.

4. I do not now own, nor have I ever owned, any stock in the Bank of America in any amount whatever. To my knowledge, no other person or entity holds, or has ever held, any stock in the Bank of America in my behalf, either in my name or any other name or designation.

5. My annual Statements of Economic Interests, filed under oath with the Clerk of the Court, First Appellate District, accurately reflect that I do not own and have never owned any Bank of America stock.

6. I have never publicly stated or claimed, either in open court on April 29, 1986, or at any other time and place, that I owned stock in the Bank of America.

7. I presently own, and for some time have owned, a Visa credit card issued in the ordinary course of business by the Bank of America. Prior to the 1984 repeal and replacement of Code of Civil Procedure section 170, it was my usual practice, in proceedings involving the Bank of America as a party, to disclose the debtor-creditor relationship resulting from my periodic use of the Visa card. Though I have no independent recollection of

statements made in connection with oral argument on April 29, 1986, it is likely that—consistent with my past practice— I made a similar disclosure of ownership of a Bank of America Visa card.

8. I have attached the following certified copies of court records for the First Appellate District, Division One:

Certified copies of the minutes of April 29, 1986 and April 30, 1986 (Exhibits A and B, respectively) and certified copies of the computerized docket entries for Johnson v. Daon Corporation (A0279361 and Alexander v. Alexander (A023629) (Exhibits C and D, respectively). Those minutes and computerized docket entries reflect the following:

a) There was no oral argument in Johnson v. Daon Corporation (A027936), the matter for which Gunn attests he appeared and made an oral argument (Exhs. A, C);

b) No action was taken on April 29, 1986, in Alexander v. Alexander (A023629), the matter for which Ares attests she appeared. However, a written request for continuance was filed by Ares on April 30, 1986, and granted by the court that same day (Exhs. B, D).

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 29th day of June 1988 in San Francisco, California.

_____

John T. Racanelli

EXHIBIT A

San Francisco, April 29, 1986
Division One

COURTROOM PROCEEDINGS

The court met in its courtroom at the State Building, 350 McAllister Street, San Francisco, CA at 9:00 a.m. Present: Racanelli, P.J., Elkington, J., Newsom, J., P. Keeley, Deputy Clerk.

A029660 — People v. Delgado. Cause called and argued by James Kyle Gee for appellant and Gene Kaster for Respondent. Cause ordered submitted.

A027188 — People v. Watkins. Cause called and argued by Deborah Tuttleman for appellant and Ann K. Jensen for respondent. Cause ordered submitted.

A026704 — Wright v. Toomajian. Cause called and argued by Orville L. Wright for appellant and Geoffrey A. Mires for respondent. Cause ordered submitted.

A025332 — Margaret Inda Smyklo v. Alexander Smyklo. Cause called and argued by Alexander Smyklo, appellant in pro per and S. Simone Campbell for respondent. Cause ordered submitted.

A026709 — Frank Barberis v. Bank of America. Cause called and argued by William M. Lukens for appellant and Kristan D. Whitten for respondent. Cause ordered submitted.

At this time Holmdahl, J., joins the bench for the remainder of cases argued.

A026551 — People v. Smith. Cause called and argued by Paul Wolf for appellant and Mark S. Howell for respondent. Cause ordered submitted.

At this time Racanelli, P.J., leaves the bench for the remainder of the cases argued.

A030691 — People v. Carpenter, Jr. Cause called and argued by Catalina Lozano for appellant and Jeff Bryant for respondent. Cause ordered submitted.

A026959 — Sierra Mortgage v. Bi'Anny Corp., Stephen Lopes et al. Cause called and argued by Wade H. Hover for appellant Stephen Lopes. Leo M. Cook, attorney for respondent, did not appear. Cause ordered submitted.

Court adjourned in tribute to the late Justice Murray Draper.

Oral argument having been waived, the following cases are deemed submitted:

A023402 — Rodrigues et al. v. Lewis et al.
A028446 — People v. Slater.
A028289 — Bouzos et al. v. City of Berkeley et al.
A027936 — Johnson et al. v. Daon Corp. et al.
A030075 — Buckenmeyer v. Parmelee et al.

Court recessed until Wednesday, April 30, 1986 at 9:00 a.m.

Minutes of the First Appellate District, microfilm roll 59; printed in Advance Sheet No. 15 (June 3, 1986), pp. 70-71.

EXHIBIT B

San Francisco, April 30, 1986

Division One

A023629 — Mabel G. Alexander v. Richard E. Alexander. The request for continuance of oral argument is granted. The cause heretofore scheduled for hearing on Tuesday, April 29, 1986 at 9:00 a.m. is taken off calendar and rescheduled for hearing on Tuesday, May 27, 1986 at 9:00 a.m. Racanelli, P.J.

A027435/A033676 — George S. Krusi v. Bear, Stearns & Co. The request that same panel hear related appeals is denied.

The request to augment the record is treated as a request to take judicial notice and as such, is granted. Judicial notice will be taken of the transcript of the hearing held March 7, 1984. Elkington, Acting, P.J.

A032599 — Thomas E. Flowers etc. v. San Francisco Residential Rent Stabilization & Arbitration Board; Golden Gateway Center et al., Real Parties in Interest.

A032602 — John L. Farr, etc. v. San Francisco Residential Rent Stabilization and Arbitration Board; Stonestown Properties, Inc. et al. The stipulated motion for consolidation of the above-entitled appeals is granted for purposes of briefing, oral argument and decision in Division One. Racanelli, P.J.

A034789 — In re Helmut August Hanken. The petition for writ of habeas corpus and continuance of bail pending determination of the proceeding is denied. Racanelli, P.J.

A034794 — Joseph Wilfred Boulet v. Superior Court, Alameda County; People, First Appellate District. The petition for writ of prohibition is denied. Racanelli, P.J.

Minutes of the First Appellate District, microfilm roll 59; printed in Advance Sheet No. 15 (June 3, 1986), pp. 74-75.

EXHIBIT C

COURT OF APPEAL OF THE STATE OF CALIFORNIA FOR THE FIRST APPELLATE DISTRICT

DIVISION: 1

Case No. A027936

TITLE

JOHNSEN, ALBERT C., Et Al.

vs.

DAON CORPORATION, Et Al.

SUPERIOR COURT INFORMATION

County: Santa Clara
Superior Court No.: 483580
Superior Court Judge: H. B. Thompson
Notice of Appeal Date: July 5, 1984

ATTORNEYS—LITIGANTS

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San Francisco, CA 94104

JOHNSEN, ALBERT C. — *Plaintiff-Appellant*

CARROLL, DAVID
PO Box 5080
Costa Mesa, CA 92626

DAON CORPORATION, ETC. — *Defendant-Respondent*

DOCKET ENTRIES

July 11, 1984
Supreme Court Order Filed Transferring Case.

July 11, 1984
Notice of Appeal Lodged/Received.
Fee Paid Attys Gunn and Deyhimy

December 18, 1984
Record On Appeal Filed.
R 3
Under 5.1 Ruling

January 2, 1985
Note:
Kelly of Atty Ruben'S Office Called Re: Not Receiving the Record Due To Incorrect Address of

January 2, 1985
Note:
P.o. Box 5030 When the Correct Address is P.o. Box 5080

January 18, 1985
Filed Letter From:
Richard Ruben Dated 1-2-85 Re His Correct Address.
Atty Screen Has Been Corrected.

January 24, 1985
Apellant'S Appendix and Opening Brief Filed.
2 Volumes of Appendix

March 1, 1985
Respondents Brief Filed.

March 15, 1985
Motion Filed.
To Augment Record From Atty David Carroll of Drummy, Garrett King & Harrison For Resp. daon Corp.

March 15, 1985
Previous Entry Continued.
Tct 4-1-85

April 1, 1985
To Court.
Motion To Augment Record. To Martha (From Resp. Daon Corp.)

April 15, 1985
Case Fully Briefed.
No Arb Received.

May 14, 1985
Order Filed.
Mot. to Augment Record Granted. Record Deemed Aug. To Include A Tx of Proceed. held 8-9-82 and Exh. n

May 14, 1985
Previous Entry Continued.
To Plfs. and Appell. first Amended Complaint Attachd To Motion To Aug. (Jt)

March 28, 1986
Calendar Notice Sent. Calendar Date:
Tuesday, April 29, 1986 At 9:00 a.m. (N,E,H) Pak

April 9, 1986
Request for Oral Argument Filed By:
Atty Carroll For Rspdt Daon Corp. only If Applts Req. oral Argument. (Pak)

April 29, 1986
Argument Waived, Cause Submitted.
Pak

June 26, 1986
Opinion Filed.
Judgment of Trial Ct Dismissing the 1st, 2nd, 3rd And 7th Causes of Applt's Second Amended Complaint

June 26, 1986
Previous Entry Continued.
Is Reversed. The Case Is Remanded To the Trial Ct For Proceedings Consistent With the Views

June 26, 1986
Previous Entry Continued.
Expressed Herein. (See Dissenting Opinion)
Np (Pak)

August 26, 1986
Remittitur Issued.
Jt

CASE DISPOSITION INFORMATION

Disposition Date: June 26, 1986
Disposition: Reversed & Remanded To Trial Court W/Directions.
Opinion Type: Sign Npub
Disposition Final: (Y = Yes — Blank = No) Y
Notation: Newsom J (A) Elkington Apj (C) Holmdahl (D)

JUDGES PANEL INFORMATION

Judge Name: Newsom, William A. (J)
Role: Authoring

Judge Name: Elkington, Norman (J)
Role: Participa
Voted: Concur

Judge Name: Holmdahl, John (J)
Role: Participa

END OF DOCKET CARD INFORMATION

EXHIBIT D

COURT OF APPEAL OF THE STATE OF CALIFORNIA FOR THE FIRST APPELLATE DISTRICT

DIVISION: 1

Case No. A02369

TITLE

ALEXANDER, MABEL G.
vs.
ALEXANDER, RICHARD E.

SUPERIOR COURT INFORMATION

County: San Francisco
Superior Court No.: 723984
Superior Court Judge: I. H. Grant
Notice of Appeal Date: July 28, 1983

ATTORNEYS—LITIGANTS

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110 N. Third St.
San Jose, CA 95112

ALEXANDER, RICHARD E. *Defendant-Appellant*

DE HART, GLORIA, Deputy
6000 State Building
San Francisco, CA 94102

ALEXANDER, MABEL G. *Plaintiff-Respondent*

DOCKET ENTRIES

August 2, 1983
Notice of Appeal Lodged/Received.
Fee Paid Atty Ares

August 31, 1984
Record On Appeal Filed.
C 1 R 1

September 28, 1984
Stipulation of Extension of Time Filed To: †††
Aob To November 1, 1984 Granted.

November 1, 1984
Stipulation of Extension of Time Filed To: †††
Aob To December 1, 1984 Granted.

November 30, 1984
Appellant'S Opening Brief Filed.

January 2, 1985
Stipulation of Extension of Time Filed To: †††
Rb To March 1, 1985 Granted.

March 7, 1985
Respondent Notified Pursuant To Rule 17(B).

April 2, 1985
Respondents Brief Filed.

April 25, 1985
Appellant'S Reply Brief Filed.

April 25, 1985
Case Fully Briefed.

March 28, 1986
Calendar Notice Sent. Calendar Date:
Tuesday, April 29, 1986 At 9:00 a.m. (N, R, E)
Pak

April 3, 1986
Request For Oral Argument Filed By:
Atty Ares For Applt Richard Alexander. (Pak)

April 30, 1986
Filed Letter From:
Req. continuance of Oral Argument From Dolly Ares Office, Atty For Applt. (Pak)

April 30, 1986
Order Filed.
Cont. of Oral Argument Granted. Cont. To Tuesday, May 27, 1986 At 9:00 a.m. (Pak)

May 27, 1986
Cause Argued and Submitted.
Jt

August 20, 1986
Opinion Filed.
The Judgment Is Reversed. Costs Are Awarded To Appellant. Np (Pak)

September 30, 1986
Petition For Review In Supreme Court Received.
A.g. Gloria De Hart.
Jt

September 30, 1986
Petition For Review Filed In Supreme Court.
Pak

November 12, 1986
Petition For Review Denied In Supreme Court.
Respondent. (N, R, E) (Pak)

November 12, 1986
Remittitur Issued.
Pak

CASE DISPOSITION INFORMATION

Disposition Date: August 20, 1986
Disposition: Reversed In Full.
Opinion Type: Sign Npub
Disposition Final: (Y = Yes — Blank = No) Y
Notation: Newsom J (A) Racanelli Pj (C) Elkington J (C)

JUDGES PANEL INFORMATION

Judge Name: Newsom, William A. (J)
Role: Authoring

Judge Name: Racanelli, John T. (Pj)
Role: Participa
Voted: Concur

Judge Name: Elkington, Norman (J)
Role: Participa
Voted: Concur

APPENDIX C

AFFIDAVIT OF DAVID B. FLINN

I, DAVID B. FLINN, under penalty of perjury, declare as follows:

Petitioner IRENE O'CONNELL KRUSE commences her "Statement of the Case" of the Petition for Writ of Certiorari with the statement that the undersigned and his law firm "have long acted as the attorneys on behalf of the family corporation of Justice William A. Newsom, who participated on the panel of three Justices who reversed Petitioner's judgment." That statement is completely untrue. Neither I, nor the law firm of Leland, Parachini, Steinberg, Flinn, Matzger & Melnick, has ever represented Justice Newsom.

In May of 1982 Justice Newsom, in an arm's length negotiated transfer, sold all of his shares of Squaw Valley Improvement Corporation to two sisters and a brother. Prior to the sale, the corporation was represented by Lawrence Silver of the law firm of Feldman, Waldman & Kline of San Francisco. Throughout the entire sale transaction Justice Newsom was represented by Edwin Shiver of San Francisco.

In June of 1982, after the sale, the corporation, then controlled by Justice Newsom's sisters and brother, employed the undersigned and his law firm, Leland, Parachini, Steinberg, Flinn, Matzger & Melnick, to dissolve the corporation and distribute the assets amongst the three shareholders, and *only then* (after Justice Newsom's withdrawal), did the undersigned and his law firm commence representation of the corporation. (The corporation was liquidated and dissolved.)

The form entitled "Statement by Domestic Stock Corporation" attached as Exhibit G to the Petition is a standard California form which is mailed annually by the California Secretary of State to each corporation. The portion at the top which reads "Squaw Valley Improvement Corporation, William A. Newsom, Jr., 350 McAllister Street, San Francisco, CA 94102" is a prestamped address placed upon the form by the Secretary of State from the prior year's filing. Thus, the inclusion of Justice Newsom upon the form is solely as ad-

dressee of the form, since the Secretary of State records from 1981 showed his office as the "corporate office." The new shareholders changed the place of business of the corporation to the office of my law firm, and only the new shareholders acted as officers and directors. Justice Newsom had no further involvement with the corporation and thus neither I, nor my firm, represented the corporation at a time that Justice Newsom was a shareholder.

Dated: December 19, 1988.

DAVID B. FLINN

David B. Flinn

Sworn to and subscribed before me this 19th day of December, 1988.

HELEN D. CARLSON

Notary Public

APPENDIX D

1st Civil Nos.
A0 33064, A0 39161

IN THE

Supreme Court of the State of California

IRENE O'CONNELL KRUSE,

Plaintiff and Respondent,

GEORGE R. JEWELL
and CHARLES DUCK,
Trustee of the Bankruptcy Estate
of GEORGE M. JEWELL
and LAURA E. JEWELL,

Cross-Complainants and Respondents,

v.

BANK OF AMERICA, N.T. & S.A.

Defendant, Cross-Defendant and Appellant.

(Sonoma County
Court No. 112439)

PETITION FOR REVIEW OF DECISION OF THE COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION ONE

A. BARRY CAPPELLO
THOMAS G. FOLEY, JR.
FRANCES E. KOMOROSKE
LEILA J. NOEL
CAPPELLO & FOLEY
831 State Street,
Santa Barbara, CA 93101
Telephone (805) 564-2444

Attorneys for Cross-Complainants and Respondents GEORGE R. JEWELL and CHARLES DUCK, Trustee of the Bankruptcy Estate of GEORGE M. JEWELL and LAURA E. JEWELL

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[1] Page references have been revised to conform to the pagination of this Appendix.

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TO THE HONORABLE CHIEF JUSTICE OF CALIFORNIA AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA:

George R. Jewell and Charles Duck, trustee of the bankruptcy estate of George M. Jewell and Laura E. Jewell, cross-complainants and respondents (the "Jewells"), respectfully petition for review following the decision of the Court of Appeal, First District, Division One (per Racanelli, P.J.), filed on May 18, 1988 and modified June 17, 1988.

I

INTRODUCTION

The farm credit crisis of the 1980's, brought about in part by questionable practices of agricultural lenders, resulted in the foreclosure of thousands of acres of agricultural land throughout the country. The reaction by Midwestern farmers included murders of bankers and suicides, while California farmers reacted in a more civilized way by resorting to the courts. This case represents the first of those decisions favorable to farmers which has worked its way through the California judicial system.

That journey was abruptly blocked by an appellate court, two of whose justices have direct, undisclosed financial ties to the appellant Bank of America, California's largest agricultural lender. Those ties include the ownership by one justice of Bank of America stock during the pendency of this appeal, a fact admitted by him in open court and corroborated by independent attorneys. It also includes a substantial loan from the Bank of America to another justice which was obtained during the pendency of this appeal, a fact substantiated by the justice's Form 721 Statement of Economic Interests.

The two justices, in disregard of their duty to disqualify themselves to avoid having their impartiality questioned, refused respondents' requests to recuse themselves. In the face of these obvious conflicts, the court instead issued two published opinions which reversed a multi-million dollar jury verdict against the Bank of America in a decision being described by

the commentators as "extraordinary", "highly unusual", and "very surprising". The appearance, if not the fact, is unmistakable: These justices were not impartial. That appearance was later confirmed by the comments of the justices and their staff to the press.

The court's total disregard of traditional standards of appellate review was proof in and of itself of its lack of impartiality. By selectively disregarding evidence, judging witnesses' credibility, crediting the Bank's version of the facts over those supporting the judgments, and otherwise performing the functions of the jury, the appellate court stepped far beyond the bounds of propriety in stretching to reach a decision extremely favorable to a party to whom it had financial ties. This decision provided an immediate benefit to the Bank of America in relieving it of a multi-million dollar judgment; more importantly, it discourages future challenges to the Bank's improper practices.

Conduct such as the appellate court's destroys the public's perception of the independence and integrity of the judiciary, and raises serious questions over its ethics. This Court is therefore respectfully petitioned to grant review to uphold the traditionally high ethical standards of the California courts.

II

ISSUE PRESENTED FOR REVIEW

This case presents one issue for review: Should a decision in a landmark lender liability case be allowed to stand when the decision was wrongly decided by two justices who should have disqualified themselves?

III

STATEMENT OF THE CASE

A. Procedural History.

The Jewells filed these actions against the Bank in 1981; a three-month jury trial began on April 22, 1985. During trial it was discovered the Bank had wilfully suppressed evidence

damaging to its case; that evidence was ordered disclosed. (V.37:3476-87.[1]) After eight days of deliberations, verdicts were rendered on July 19, 1985. (R.A. 152-53.)

The jury awarded the bankruptcy estate of George and Betty Jewell $12.75 million in compensatory damages and $19 million in punitive damages. (R.A. 154.) George R. was awarded $4.5 million in compensatory damages and $1 million in punitive damages. (R.A. 155.) Special interrogatories indicated the jury found in favor of the Jewells for actual fraud, constructive fraud, and bad faith breach based on the denial of the existence of a contract.[2] (R.A. 150-51.)

The Bank moved for judgment notwithstanding the verdict and new trial; the trial court denied the former, but conditionally granted the latter if the Jewells did not consent to a $15 million reduction in the punitive damage awards. (R.A. 343-47.) The Jewells consented to the remittitur, the Bank appealed, and the Jewells cross-appealed. (R.A. 348-50, 351-59, 360-67.)

On May 18, 1988, the Court of Appeal filed its initial opinion, certified for publication, which overturned the Jewells' judgments. That opinion ignored virtually all rules of appellate review and was seemingly motivated by a desire to reach a decision favorable to the Bank. The linchpin to the Jewells' case, their fiduciary relationship with the Bank, was totally disregarded, as was the substantial evidence supporting the jury's findings that the Bank had committed three separate torts in ten distinct instances over a four-year period. In response to these and many other factual and legal errors, the Jewells filed a petition for rehearing on June 2, 1988.

On June 11, 1988, the Jewells for the first time learned from counsel for respondent Mrs. Kruse that Presiding Justice Racanelli had stated on April 29, 1986 at oral argument of an

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[1] Excerpts from the reporter's transcript are cited by volume and page number; "R.A." is respondent's appendix.

[2] The basis for these findings was a series of acts by the Bank over a four-year period which constituted actual and constructive fraud in 1976; actual and constructive fraud in 1977; actual fraud, constructive fraud, and bad faith breach of contract in 1978-79; and actual fraud, constructive fraud, and bad faith breach of contract in 1980.

unrelated Bank of America case that he owned stock in the Bank of America. (Ex. A. at p.2.) It was also then learned that Justice Newsom had paid off or otherwise discharged loans to the Bank of America and then negotiated for and obtained a new custom line of credit from the Bank in excess of $10,000 in 1987 while this appeal was pending. (*Id.* at pp. 8, 11, 14, 17.) An investigation was begun, and a request made that the two justices disqualify themselves and grant rehearing if Mr. Lukens' allegations were true.

The response of the justices, their staff attorneys, and the Bank to these serious charges of impropriety was highly troubling. In the media, Justice Racanelli enigmatically stated to *The Recorder* in an article published June 15, 1988 that he had "no reportable stocks or bonds" in the Bank of America, implying he owned *some* interest. (Ex. B.) Justice Newsom declined all comment. (*Ibid.*)

The court's attorneys *did* comment; one stated that Justice Racanelli "has never owned Bank of America stock," and claimed that "Mr. Lukens misunderstood what was said or misrecollected" the events of April, 1986. (*Ibid.*) However, two independent attorneys present at the April, 1986 oral argument have corroborated Mr. Lukens' statement that the two justices did in fact admit to their financial ties to the Bank of America. (Exs. C and D.)

The principal court attorney for the First District was quoted in *The Recorder* article as stating that Justice Racanelli did not learn that this appeal was assigned to his panel until February, 1987, and that:

> "If he owned stock, he obviously would have disqualified himself. Judges recuse themselves for the slightest of reasons. Even the appearance of impropriety. I am sure there was none of that here." (Ex. B.)

That is not true; as the docket sheet from Division One, District One indicates, this case was before this panel on October 24, 1985. (Ex. E.) One December 4, 1985, this panel sent Mr. Lukens a notice regarding his filing fee (Ex. F), and on July 22, 1986, Justice Racanelli himself granted the Bank of America an extension to file its opening brief. (Ex. G.)

The day after *The Recorder* article, the requests for disqualification were denied along with the petitions for rehearing. A new, modified opinion with over 100 changes was issued; it was also certified for publication despite the fact that it, like the prior opinion, failed to meet the requirements of California Rule of Court 976(b). (App. A.)

B. Statement of Facts

The Jewells jointly owned and operated a highly successful business in Sebastopol which grew, brokered, transported, and packed apples.[3] (R.A. 419, 891; V.25:4202.) The Jewells had been customers of the Bank of America since the late 1930s, and they developed a close friendship with Bill Sullivan, the local branch manager. (V.9:1911, V.10:2250-34, V.24:4166, 4200-lb.)

The Jewells were unsophisticated in financial matters and relied extensively on Sullivan for advice and guidance in that area. (V.10:2250-88, V.24:4200-lb, 4200-2, 4200-5.) The Jewells believed Sullivan to *be* the Bank of America, and whatever he told them, they "banked on." (V.11:2335, V.24:4200-4, 4200-5, V.25:4211, 4216.)

The Bank first exploited this fiduciary relationship in 1976 when it induced the Jewells to borrow $150,000 from the Bank to save the James E. O'Connell Company ("O'Connell") from an impending foreclosure sale which would have exhausted the Bank's security for its loans to O'Connell. (R.A. 556, 565; V.16:3154-56, V.25:4217-18, 4225.) Sullivan failed to disclose to the Jewells the severe financial problems O'Connell was facing and the fact the Bank would not loan any more money to it. (R.A. 542; V.11:2283, 2290-92, V.15:2987-88, V.25:4218.) This intentional concealment was documented by an internal memo by Sullivan. (R.A. 824.)

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[3] These facts are necessarily severely abridged because of space limitations; a more detailed rendition is located in the Jewells' Respondents' Brief filed April 3, 1987.

Months later O'Connell faced another financial crisis and the Jewells loaned it another $114,000 which they borrowed from the Bank, still operating under the assumption that Sullivan would advise them if they should not do so. (R.A. 504-13; V.25:4237-39, V.26:4440-41.) The two loans caused a severe strain to the Jewells' working capital, a fact reflected in internal Bank documents which questioned the Jewells' ability to repay the Bank. (R.A. 548-55, 557, 565; V.11:2315-19, 2323, V.25:4232-34.)

Despite this knowledge, Sullivan's superiors at the Bank decided to induce the Jewells to borrow from the Bank to pay off O'Connell's delinquent loans to the Bank, a fact documented in its internal memos. (R.A. 565, 573.) When George questioned why the Bank wanted him to pay off O'Connell's delinquent loans, Sullivan said his superiors at Regional Credit Administration ("Regional") had asked that George do this, but that if any problems arose because of it, the Bank would work with the Jewells to solve them. (V.12:2541; V.25:4235-37.)

The promised assistance included a long-term loan to consolidate the Jewells' short-term debt; the Jewells promised not to encumber their ranch so it would be available as security for that loan. (V.10:2069-70, V.11:2376, V.12:2426, V.13:2641-44, V.25:4236-37, 4277-79, V.26:4346.) The Jewells believed that by doing as their friend Sullivan asked, Sullivan was committing to help them; based on this belief, the Jewells borrowed $150,000 *from* the Bank and gave it *to* the Bank to pay off O'Connell's delinquent loans. (R.A. 577, 578; V.11:2372-76; V.25:4236-37.)

The Jewells' financial condition quickly degenerated as a result of their "favor" to Sullivan, a fact reflected in the Bank's documents. (R.A. 573, 658, 891.) The burden imposed by their large loans to O'Connell prevented them from paying back from their own operations the funds they had borrowed from the Bank for O'Connell. (V.11:2350-51; V.25:4235-37; V.33:5805-07, 5812-13.) This set in motion a spiral of debt which forced the Jewells to borrow more funds from the Bank for O'Connell in the futile hope O'Connell could thereby recover and repay the Jewells. (V.12:2446, V.25:4242-43, 4250, V.26:4454.)

When it became necessary to construct a new dehydrator for the O'Connell plant, Sullivan agreed to make a $1 million long-term loan to be secured by the new plant. (R.A. 659; V.25:4250-52, V.26:4346.) This agreement was evidenced by Betty's notes from a meeting with Sullivan, which were found in his files. (R.A. 659; V.25:4250-52, V.37:6581-82.) As a result of discussions with Sullivan at this meeting, the Jewells believed the Bank would make a long-term loan on the O'Connell plant or, if necessary, the Bank would make a long-term loan directly to the Jewells secured by their ranch. (V.12:2508-10, V:25:4250-52, 4277-79, V.26:4346.)

Sullivan later informed George that the Bank would not fund the O'Connell project if Dan O'Connell managed it. (V.25:4248-49, 4253-54; V.26:4370-71.) George refused to remove Dan O'Connell from his own family's business and instead went to the Bank's main competitor, the Production Credit Association ("PCA"), for financing. (V.25:4254.) Sullivan soon lured the Jewells back with statements that Regional regretted its refusal to loan them the funds. (V.25:4258, V.26:4391.)

Regional was actually motivated by its concern that the PCA might get a security interest in the Jewell's ranch, but to the Jewells, Sullivan's statements meant the Bank would fund the O'Connell plant. (R.A. 599; V.10:2069-70, V.12:2474-75, V.25:4259.) The Bank made a $209,000 equipment loan to the Jewells for that plant; in exchange it asked the Jewells for deeds of trust on their property. (R.A. 606-17; V.12:2480-81, V.25:4259.) The Jewells resisted encumbering their own property for O'Connell since they "did not owe the industry that much." (V.25:4259-60.)

The fact that the Bank made an equipment loan on a project indicated to the Bank's assistant manager that the Bank would make a long-term loan on that project. (R.A. 606-17; V.20:3600-09, 3600-10.) A Bank vice-president also testified it would be unusual for the Bank to make an equipment loan for a project without providing a long-term loan. (V.23:3977-78.) In addition, it was standard Bank practice to loan funds for major construction projects only after permanent financing had been arranged. (V.21:3641, 3701, V.23:3959-60, 4047,

V.30:5141.) The Bank knew that the funds it was advancing the Jewells were being used for O'Connell; this also implied the long-term loan was forthcoming. (R.A. 644-46, 655-56, 712-30, V.23:4049-50/1b, V.34:5864-66, 5878-79.)

Sullivan's practice of advancing construction funds on the basis of oral assurances that long-term loans would eventually be approved was repeated by him on at least two other projects: The $17.7 million Sebastopol Cooperative Cannery ("Co-op") and the $900,000 "Fresh Pack" plant which George R. built for packing and storing high quality apples. (R.A. 461, 862-71; V.7:1423, V.9:1990, V.13:2741, V.19:3303-07, V.32:5553, V.25:4265.) This was an unorthodox way of financing major construction projects, yet Sullivan routinely followed it and even advanced sums which exceeded his lending limit. (R.A. 634-43, 647, 862-71; V.13:2754-56, V.14:2777, 2782-86, V.20:3600/9-10, V.22:3858.) The Co-op and Fresh Pack plants eventually got the long-term loans promised by Sullivan. (V.9:1964-65, V.32:5553.)

As the O'Connell project advanced, various representatives of the Bank repeatedly visited the site and offered nothing but encouragement to the Jewells. (R.A. 454; V.32:5526-27.) Sullivan's support was unflagging, and his superior Norm Jensen also expressed his enthusiasm to the Jewells. (V.9:1985-88, V.12:2526-28, V.23:4051/14, V.25:4248, 4263, .4265, 4281-83, V.26:4455-56, 4500/7, V.32:5519, 5525-27, V.36:6418-19.) No one from the Bank ever said or did anything which discouraged the Jewells from going forward with the project or which indicated that the long-term loan might not be approved. (V.4263, 4265-66). As a result, the Jewells believed that "further up in the Bank everything was in accord." (V.25:4282-83, V.26:4500/7.)

This belief was not unreasonable; the Bank's own policy manual prohibited "entering into detailed discussions or negotiations with customers regarding complex, controversial, or unusual transactions" without prior approval by Regional. (R.A. 887.) The manual also directed the Bank's employees to "[e]xercise care in such discussions to ensure that the customer does not interpret the discussions as a commitment." (*Ibid.*)

Internal Bank documents evidenced the Bank's intent to make the loan, as well as the fact the Jewells were relying on the loan to help them repay the debt they were incurring on the O'Connell project. (R.A. 437, 454, 631, 644, 645, 648-49, 813; V.9:1987-88, V.10:2250/27, V.12:2511-12, 2527). Other documents indicate Regional knew Sullivan was advancing large sums to the Jewells for the O'Connell project and that these could only have been repaid with a long-term loan. (R.A. 404-05, 589-91, 606-17, 631, 632-33, V.9:1797, V.23:3989.)

Despite this knowledge, the long-term loan was denied on the pretense the O'Connell plant was "special purpose" and the Bank loaned funds only for multi-purpose buildings. (R.A. 424; V.22:3773, 13878-79.) The plant was in fact multi-purpose; in addition, the Jewells' Fresh Pack plant, which *did* obtain a long-term loan, *was* a special-purpose building. (R.A. 424, 663; V.9:1791, V.22:3878-79.)

Sullivan argued these points to Regional in an impassioned memo, criticizing the Bank for disregarding its own policies and for failing to tell him it would not approve the O'Connell loan. (R.A. 438-40, 652-54; V.13:2656-57.) Unable to change Regional's mind, Sullivan abruptly and permanently left the Bank. (R.A. 677-78; V.13:2615-16, 2656-57, 2660.)

Sullivan was replaced as branch manager by Roger "Rocky" Bunch, whose self-proclaimed mission from his first day in Sebastopol was to get deeds of trust on the Jewells' ranch. (V.17:3171/90-92, 3171/95-96, 3171/99, V.30:5255, V.45:8056-57.) From that day on, Bunch resorted to every conceivable means to entice, persuade, humiliate, or frighten the Jewells into turning the deeds over to him. (V.26:4330, V.30:5193-94, V.30:5248-50, V.37:6589-90.) Bunch's "job and duty to the Bank [was] to try to get deeds of trust from any source I can if I possibly can" since "anything that George controlled, it would be [my] job to try to get that for the bank." (V.18:3300/10.)

On October 30, 1979, an application for a $1.9 million long-term loan for the O'Connell plant was submitted which specified all the terms and conditions of the long-term loan Sullivan had been promising the Jewells; these included a 20-year term, 12 percent interest, and the O'Connell plant as

security. (R.A. 669-75.) The application also noted that the Jewells had borrowed $1.3 million from the Bank to construct the plant in reliance on the fact the Bank would finance it. (R.A. 673.) No one from the Bank would take responsibility for the application. (V.17:3171/55-56, V.20:3600/19, V.31:5395-98.)

Bunch's mission to get the Jewells' deeds of trust became an obsession; virtually every time the Jewells met with Bunch, he asked for them. (R.A. 695; V.17:3171/101, 3171/95-96, 3171/106-107.) The Jewells refused, since Bunch never agreed to the long-term loan which Sullivan had promised and on which the Jewells had substantially relied. (V.17:3171/97, V.25:4294, V.26:4336.) The Jewells were, however, fully prepared to give the Bank the deeds of trust if it honored its promise to give them the long-term loan on their own ranch which they desperately needed, but the Bank did not. (V.17:3171/136, V.25:4294-95, V.26:4470.)

Bunch's determination paid off; in the summer of 1980, he announced to the Jewells the Bank would loan them no more money, but offered to assist them with a plan to liquidate their assets under the Bank's supervision. (V.25:4299, V.30:5248-50.) The proceeds were to go to the Bank, which would first pay the 100 apple growers who had sold apples to the Jewells and who were at that point the Jewells' greatest concern, then the PCA, and, lastly, itself. (V.30:5191, 5198-99, 5248.) The Jewells reluctantly agreed to the plan, after months of threats, humiliation, and intimidation, which culminated in George's emotional collapse at a joint Bank-PCA meeting. (V.26:4326-27, V.29:4970, V.30:5193-94, V.32:5561, V.37:6589:90.)

In reliance on Bunch's assurances of assistance, the Jewells turned over everything they owned to the Bank. V.26:4328, 4336, V.30:5242, 5250-51, 5264-66, V.32:5562, V.37:6591.) The Bank kept virtually all the proceeds of the sales of the Jewells' properties, as well as their deeds of trust. (V.26:4332, V.29:5016, V.30:5262-63, V.31:5339.)

After three years of litigation, thousands of dollars of attorneys' fees, and an order from the Bankruptcy Court, the Bank was forced to return the proceeds and deeds of trust to the Jewells. (V.29:5014, V.31:5370, V.37:6524-25.) It was undis-

puted the Jewells would never have given their deeds of trust if they had known the Bank would not honor its commitment to pay their growers and the PCA, a fact the Bank conceded. (V.26:4334, 4338; V.30:5264-65, V.37:6591-92.)

As soon as the PCA learned the Bank had "double-crossed" it by taking the Jewells' deeds of trust, the PCA moved against the Jewells. (R.A. 457, 803, 805; V.29:5001-5005, 5019-5020, V.34:5997-98.) George told Dan O'Connell, and the O'Connells filed a lawsuit to prevent the Bank from forcing the Jewells to foreclose on the O'Connell property. (V.24:4099; V.26:4338; V.29:5050-52.) George and Betty then filed a voluntary bankruptcy petition, their son followed them several months later and the 100 apple growers are still waiting, eight years later, to be paid. (R.A. 805; V.30:5123, V.31:5475/19, V.32:5573.)

IV

THE OPINION WAS WRONGLY DECIDED BY TWO JUSTICES WHOSE DIRECT FINANCIAL TIES TO THE APPELLANT BANK OF AMERICA MANDATED THEY BE DISQUALIFIED

A. Presiding Justice Racanelli Owned Stock in the Bank of America During the Pendency of this Appeal and Failed to Disclose It.

California Rule of Court 29(a)(3) mandates review of a decision of an appellate court "where, because of disqualification or other reason, the decision of the court of appeal lacks the concurrence of the required majority of qualified justices." At least one and perhaps two of the three justices who issued the opinion should have disqualified themselves from hearing this appeal. As a result, their decision is necessarily void, and review should be ordered. (*Solberg v. Superior Court* (1977) 19 Cal.3d 182, 190.)

What evidence there is on Justice Racanelli's stock ownership in the Bank of America would lead a reasonable person to conclude he should have disqualified himself from hearing

this case. At the same time this appeal was pending before District One, Division One, Justice Racanelli owned, by his admission in 1986, *some* stock in the Bank of America.

Whether Justice Racanelli still owns stock in the Bank has not been answered satisfactorily; he merely stated on June 15, 1988 he had no *reportable* interest. (Ex. B.) According to Government Code section 82034, an interest which is less than $1,000 need not be reported. Despite this, California Code of Judicial Conduct Canon 3 requires disqualification if a judge has *any* financial interest in a party. As a result, Justice Racanelli should have disqualified himself, even if his interest did not have to be reported on his Form 721.

It is no defense that Justice Racanelli has since disposed of his Bank of America stock, if that is in fact what occurred. Almost 100 years ago, this Court decided another case in which a judge owned stock in a bank which was a party to a lawsuit, yet believed he was not disqualified because he had disposed of the stock. (*Adams v. Minor* (1898) 121 Cal. 372.) This Court responded:

> We do not think that the belief of the judge one way or the other would change the fact of his disqualification. He might honestly believe and hold that he was qualified, but that would not qualify him any more than he could acquire jurisdiction by deciding that he had it. Nor do we think that removing the cause of disqualification after the case was submitted to him for decision would operate to remove the qualification. The code says if he is interested no "justice, judge, etc. . . . shall sit or act as such." This does not mean that he may hear the evidence in a case in which he is interested and may decide it, after sitting and acting in it, provided he remove the cause of disqualification before he enters judgment. As we all know, the decision of questions arising during the course of the trial often determines the final judgment itself. The statute must be held to mean what it says, and it is that he shall not sit or act as judge in an action in which he is interested. (*Id.* at 375; accord. *Moody v. Shuffleton* (1928) 203 Cal. 100, 103-05.)

Disqualification rules are strictly interpreted; they mandate disqualification of judges *who do not even know of the facts which create the appearance of impropriety.* Less than two weeks ago, the U.S. Supreme Court decided the landmark decision of *Liljeberg v. Health Services Acquisition Corp.* (June 17, 1988) ____ U.S. ____ 88 Daily Journal D.A.R. 7756, in which it vacated a final order by a District Court judge because of the judge's *possible* conflict of interest, even though the judge was *unaware* of the conflict.

The Supreme Court based its decision on 28 U.S.C. § 455(a)[4]; it, like California Code of Judicial Conduct Canon 3, is based on ABA Code of Judicial Conduct Canon 3. The statute's violation is established when "a reasonable person, knowing all the circumstances, would expect that the judge would have actual knowledge" of the facts which create the appearance of partiality; in that situation the judge's "impartiality might reasonably be questioned." (*Liljeberg, supra* at 7759.)

The Supreme Court noted that the purpose of section 455(a) is to "promote public confidence in the integrity of the judicial process"; it is therefore irrelevant "whether or not the judge actually knew of facts creating an appearance of impropriety, so long as the public might reasonably believe that he or she knew." While the risk of injustice to the parties should be considered, much more significant is "the risk of undermining the public confidence in the judicial process." (*Id.* at 7760.) The Court cautioned that it "must continuously [be borne] in mind that to perform its highest function in the best way 'justice must satisfy the appearance of justice.'" (*Ibid.*, quoting *In Re Murchison* (1955) 349 U.S. 133, 136, 75 S.Ct. 623, 625.)

In weighing whether the drastic sanction of vacating a final order on which the parties have relied should be imposed, the Supreme Court found that doing so would prevent "a substantive injustice in some future case by encouraging a judge or litigant to more carefully examine possible grounds for disqualification and to promptly disclose them when discovered." (*Id.* at 7761.) The Court concluded that in all cases, the

[4] It provides: "Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

"guiding consideration is that the administration of justice should reasonably appear to be disinterested as well as be so in fact." (*Ibid.*, quoting *Public Utilities Commission v. Pollak* (1952) 343 U.S. 451, 466-67, 72 S.Ct. 813, 823; accord, *Aetna Life Insurance Co. v. Lavoie* (1986) 475 U.S. 813, 823, 106 S.Ct. 1580, 1580.)

California Code of Judicial Conduct Canon 3, like 28 U.S.C. §455(a), requires judges to disqualify themselves in any proceeding in which "their impartiality might reasonably be questioned." Despite this clear mandate and in complete disregard of the public's perception of their action, Justices Racanelli and Newsom refused to disqualify themselves, apparently in reliance on *Kaufman v. Court of Appeal* (1982) 31 Cal.3d 933, 939-40. (App. A.)

Neither *Kaufman* nor any other California case, statute, rule, or canon authorizes that action. *Kaufman* held that California follows the Federal rule in allowing a challenged justice to decide whether he sould disqualify himself, but that decision is obviously reviewable by this Court. It is also reviewable by the U.S. Supreme Court since the issue has Constitutional dimensions. (*Aetna Life Insurance Co. v. Lavoie, supra* at 825, 1587, quoting *in Re Murchison* (1955) *supra* at 136, 625; see also, *Ward v. Village of Monroeville Ohio,* (1972) 409 U.S. 57, 60, 93 S.Ct. 80, 83).

Whatever interests Justices Racanelli and Newsom had in the Bank of America should have been disclosed to allow the parties and their counsel the choice of proceeding with that panel. This Court demands no less of itself; those justices who are shareholders in the Bank of America routinely disqualify themselves from considering cases involving the Bank of America. (Ex. H).

The same is true of the Federal courts; U.S. District Court Judge William A. Ingram, who unknowingly and indirectly owned $80 worth of stock of Intel, but later disposed of it, recently disqualified himself from deciding the landmark computer copyright case of *NEC Corp. v. Intel Corp.* (Ex. I.) However, Judge Ingram did so only after he had earlier refused to disqualify himself, which prompte a request by NEC to the

Ninth Circuit Court of Appeal to intervene; at that point Judge Ingram disqualified himself and vacated all his rulings in the case.

Certainly the public deserves no less from Division One, District One, and especially from its Presiding Justice, the former chair and a current member of the Commission on Judicial Performance. The preservation of the integrity and independence of the judiciary demands adherence to the highest ideals of both personal and official conduct. (Preamble, California Code of Judicial Conduct.) Public perceptions of justice are hardly furthered when justices who are reasonably thought to be biased by virtue of financial ties to a party decide in a case, particularly Case as far-reaching and significant as this. (*Lindsay-Strathmore Irrigation District v. Superior Court* (1920) 182 Cal. 315, 334; *Tatum v. Southern Pacific Co.* (1967) 250 Cal.App.2d 40, 42.)

B. Justice Newsom Negotiated and Obtained a Substantial New Loan from the Bank of America While this Appeal Was Pending.

It appears from Justice Newsom's Form 721 that he had a car loan from the Bank of America during 1985 and two other small unsecured loans from the Bank in 1986 and 1987 which were each paid off in those years. (Ex. A at pp. 8, 11, 14.) Justice Newsom apparently thereafter negotiated and obtained, sometime between January and December, 1987, a substantial, new, unsecured "Customline credit" loan from the Bank in an amount in excess of $10,000. (*Id.* at p. 17.) Justice Newsom held this loan as of February 29, 1988; he heard oral argument in this case on February 25, 1988. (*Id.* at p. 16.)

The Bank claims that its loan to Justice Newsom is "virtually indistinguishable from a credit card charge account". (Bank's Opposition to Petition for Disqualification, p. 9, fn. 2.) It is submitted that it could appear to a reasonable person highly unusual for a person with an income of that of an associate appellate court justice to have a credit card from the Bank of America with a limit in excess of $10,000. Whether such a credit arrangement is in fact "a loan from a lending

institution in its regular course of business on the same terms generally available to persons who are not judges", as authorized by Canon 5C (4)(b), is a matter which cannot be determined by virtue of Justice Newsom's refusal to comment.

However, even if the loan were technically permitted by Canon 5C (4)(b), its propriety must still be weighed against the admonition in the Commentary to Canon 5C which states that judges should "refrain from engaging in business and from financial activities that might interfere with the impartial performance of their judicial duties." It must also be weighed against the paramount concerns of Canon 3C, which requires judges to disqualify themselves *in any proceeding in which their impartiality might reasonably be questioned.* It is submitted that a reasonable person would find it highly unseemly that a judge who had the power to decide a major case which substantially affected the financial interests of a lender was negotiating with that lender to obtain a large, unsecured loan while the case was pending before him.

In any event, if Justice Newsom felt his old loans were significant enough to disclose it at the April, 1986 oral argument of a minor Bank of America case, then certainly it would have been more important to disclose his new, increased loan in this landmark decision. His failure to even mention it in this proceeding raises serious doubts about his impartiality and leaves the public with the distinct impression that perhaps justice is not blind.

C. The Bias of the Court is Evident From The Opinion's Intentional Rejection of Established Principles of Appellate Review.

The decision in this case was, to say the least, shocking. Lenders' counsel and the commentators were as surprised as the parties and their counsel that an appellate court would reverse jury verdicts and a new trial order on the basis on an alleged lack of substantial evidence. William Burke, bank counsel and authority in lender liability, described the decision as "highly unusual." (Ex. J.) Professor Schecter of Loyola Law School, another authority in the field, described it as "very surprising" since "the appellate court is in essence saying that

no reasonable jury could have come to the conclusion that this jury came to. This is extraordinary."[5] (*Ibid.*)

Reversals based on a lack of substantial evidence are rare; this is so because of the well-established rules which presume the judgment to be correct, prevent reviewing courts from weighing evidence and re-examining questions of fact, and require that the evidence and the inferences based thereon be viewed in the light most favorable to the prevailing party. All of these rules were completely disregarded, along with both substantial evidence and legal authority which supported the verdicts. No rational explanation exists for this result, other than a lack of impartiality by the court which rendered the decision.

1. The Opinion Refused to Consider the Existence of the Fiduciary Relationship Between the Jewells and the Bank.

The Opinion cavalierly dismissed what was probably the most central issue in the case: The Bank's exploitation of its admitted fiduciary relationship with the Jewells.[6] (App. A at 17.) Had it not done so, it would have been compelled to find in favor of the Jewells for three reasons.

First, there is no question that the Bank had a duty to disclose facts to the Jewells which it failed to disclose and that it took undue advantage of the Jewells by using them "as tools with which to alleviate the results of its own prior poor loan judgment" by paying off O'Connell's delinquent loans. (*First National Bank in Lenox v. Brown* (Iowa 1970) 181 N.W.2d 178, 184.) That shifted the burden of proof to the Bank to prove its good faith and lack of undue influence, a burden the Bank never met; it also constituted constructive fraud. (*Estate of Sanders* (1985) 40 Cal.3d 607, 616.)

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[5] Almost as surprising was the modified opinion which omitted some issues which had been raised *sua sponte* by the court, changed substantially the court's interpretation of the facts, and substituted new legal authority for old. Despite these concessions that the original opinion was both factually and legally erroneous, the ultimate decision to reverse remained unchanged.

[6] The opinion ignored both the facts and the law on fiduciary relationships, including cases such as *Barrett v. Bank of America* (1986) 183 Cal.App.3d 1362, in which the Bank of America was found liable for acts strikingly similar to those of this case.

Second, the existence of the fiduciary relationship required the Jewells' reliance to be measured by a different standard than that used in the opinion. (*Barbara A. v. John G.* (1983) 145 Cal.App.3d 369, 382.) As discussed *infra*, the Jewells met the correct standard.

Third, since the judgment was based on the three separate torts of actual fraud, constructive fraud, and bad faith breach, it had to be affirmed if any *one* of the three was supported by substantial evidence and unaffected by error. (*Khanna v. Microdata Corporation* (1985) 170 Cal.App.3d 250, 258.) The constructive fraud claim was fully supported both legally and factually; thus, the judgments should have been affirmed.

2. The Opinion Ignored the Substantial Evidence of the Long-Term Loan Commitment and The Bank's Breaches.

The opinion claims the parties never got beyond the negotiating stage, and that therefore no contract ever arose. (App. at 28-31.) While this issue was never raised at trial and there was necessarily no evidence on it, what *was* proven at trial clearly disproves it.

First, it is only when the evidence *clearly shows* an agreement is subject to further negotiations that it will not be enforced on the basis the parties were merely negotiating. (*Corbin on Contracts* (1963) §95, pp. 397, 401-02.) There was no such evidence.

Second, the fact that one party to the agreement begins performance with the knowledge of the other proves the contract was consummated. (*Id.* at 407.) Here, the Jewells did everything the Bank asked of them and substantially relied on the fact the Bank would perform.[7]

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[7] For this reason, the Jewells have consistently argued that it will be an idle act to reverse the judgments since the Jewells can prevail at retrial on the alternative theories of implied contract and estoppel. (*Isthmian Lines, Inc. v. Schirmer Stevedoring, Co.* (1967) 255 Cal.App.2d 607, 610.) The modified opinion concedes this point. (App. A at former fn. 14, p.29.)

The opinion also claims there was a lack of substantial evidence of the loan commitment, yet that evidence was overwhelming.[8] Many recent decisions have upheld oral loan commitments on evidence much less substantial than this.[9] There was thus no basis in the law or the facts for the opinion to conclude no commitment was made.

Similarly, there was absolutely no basis for the opinion to find no breach by the Bank of that commitment. The opinion's basis for this finding was the Jewells' alleged refusal to pledge their ranch as security for a long-term loan. However, the evidence was undisputed that the Jewells were fully prepared to do so as soon as the Bank gave them the long-promised, long-term loan, yet the Bank never did so.

Finally, the opinion includes the incredible statement that the Bank's conduct in refusing to return the sales proceeds from the Jewells' property, along with their deeds of trust, was not a breach.[10] (App. A at 31-33.) It is beyond comprehension how a court could state in a published opinion that when a party

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[8] For example, the visits by Sullivan's superiors, the Bank documents discussing the commitment, the loan application itself, the parties' course of dealing, the evidence relating to similar funding of the Co-op and the Jewells' Fresh Pack plants, Betty Jewell's notes from the December, 1978 meeting, and the Bank's practice of not advancing funds for construction projects in the absence of a long-term commitment all supported the Jewells' statements that a commitment had been made.

[9] See, *Landes Construction Co., Inc. v. Royal Bank of Canada* (9th Cir. 1987) 833 F.2d 1365; *National Farmers' Organization v. Kingsley Bank* (10th Cir. 1984) 731 F.2d 1464; *Coastland Corp. v. Third National Mortgage Co.* (4th Cir. 1979) 611 F.2d 969; *Crystal Springs Trout Co. v. First State Bank of Froid* (Mont. 1987) 732 P.2d 819; *Wait v. First Midwest Bank/Danville* (Ill.App. 1986) 491 N.E.2d 795; *K-Line Builders, Inc. v. First Federal Savings & Loan Ass'n* (Ariz.App. 1983) 677 P.2d 1317; *Bixler v. First National Bank of Oregon* (Ore.App. 1980) 619 P.2d 895.

[10] In stretching to reach this conclusion, the opinion had to consider, and resolve, highly technical bankruptcy issues which had never come up at trial and on which there was no evidence. (App. A at 32-33.); by doing so, the opinion erred both legally and factually, and violated Government Code §68081. (See, *Adoption of Alexander* (1988) 44 Cal.3d 857, 864-65.) The opinion had to also disregard such highly damning evidence as Bunch's boasts that there "was never any doubt in our mind" that the Bank would have to return the property it had in effect stolen from the Jewells. Similar conduct by the Bank has earned this Court's censure in cases such as *Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 908-09, another case in which Division One, District One again sided with the Bank of America.

makes a promise, fails to perform, denies it ever had a duty to perform, fights in court for years to prove it had no duty to perform when it knew full well it did, loses that fight, and then, when mandated by court order, belatedly and begrudgingly performs, *that* is not a "breach" of the original promise. It is submitted that only bias could produce such a result.

3. The Opinion Ignored the Substantial Evidence and Legal Authority Which Demonstrated the Jewells' Reliance Was Justifiable.

Reliance in a fiduciary relationship is measured by special standards; facts that would ordinarily require investigation may not excite suspicion, and the same degree of diligence is not required. (*Hobart v. Hobart Estate Co.* (1945) 26 Cal.2d 412, 440; *Estate of Sanders, supra*, at 619.) The opinion ignored this in concluding the Jewells' reliance was not justifiable because they allegedly knew the promised loan was beyond Sullivan's lending limit. (App. A at 21.)

The Jewells proved their reliance was justifiable given their fiduciary relationship with the Bank, their intelligence, and information. (*Seeger v. Odell* (1941) 18 Cal. 2d 409, 415.) The Jewells dealt exclusively with Sullivan, and felt it was inappropriate to confer with Sullivan's superiors. (V.25:4282.) In addition, the Jewells got nothing but positive support from Sullivan, who had in the past regularly provided the funds he promised, even if they exceeded his lending limits. Sullivan's superiors also expressed their support to the Jewells; this signified Regional approval to the Jewells. This type of belief was precisely what the Bank's policy manual warned against.

Given the Bank's decision to place Sullivan in the role of vice president and branch manager, his assurances to the Jewells were the equivalent of "factual representations of an apparently knowledgeable agent for his principal". *Skeels v. Universal C.I.T. Credit Corporation* (3rd Cir. 1964) 335 F. 2d 846, 851.) In such a situation, it was entirely reasonable for the Jewells to rely on them.

4. The Opinion Refused to Consider the Law or the Facts Which Demonstrated the Bank's Acts Were the Proximate Cause of the Jewells' Injuries.

The opinion is wrong in stating there was no substantial evidence the Jewells' injuries were proximately caused by their involvement in O'Connell, that the Jewells' ultimate destruction was inevitable, and that the law on proximate cause is contrary to the Jewells' position. First, there was overwhelming evidence that but for Sullivan's initial inducement of the Jewells in becoming involved with O'Connell and later staying involved, the Jewells would not have suffered the damages they did. This evidence ranged from Sullivan's own admission he had "participated" in the Jewells' "difficult situation" (V.12:2509-10), to an internal Bank document which noted in November, 1980 that the Jewells' problems began with their 1976 involvement with O'Connell (R.A. 891). Simple common sense also provides support; had the Jewells not gotten involved in O'Connell, O'Connell would have collapsed and there would have been no subsequent drain on the Jewells' finances.[11]

Second, there was nothing at trial which proved that the Jewells' destruction was inevitable. The opinion seized on a number of factors which allegedly contributed to the Jewells' demise, yet all but one of them directly resulted from the Jewells' involvement in O'Connell and would not have occurred but for it. (App. A at 19.) The one remaining factor, the bankruptcy of one of the Jewells' debtors, was a very minor cause of their problems and could have easily been absorbed if the Jewells had not had the burden of O'Connell. (V.26:4500-8.)

Third, the opinion is wrong in stating that if other factors also contributed to the Jewells' economic problems, then the Bank was relieved of liability. (App. A at 19.) The law is clear that if several factors contribute to the occurrence of an event, a

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[11] Other evidence included the testimony of Jewells' expert witnesses that after the Jewells paid off the delinquent O'Connell loans in 1977, they could not pay back the Bank from their own operations because of their involvement with O'Connell, and were left with insufficient operating funds as a result of that involvement. (V.11:2350-51, V.25:4235-37, V.33:5805-06, 5812-13.) In addition, the Bank's own documents reflect its concern over the Jewells' finances as a result of their involvement in O'Connell. (R.A. 557, 658, 660, 648, 887, 888, 896.)

defendant is not absolved if his conduct was a *substantial* factor, or if the other factors were within the scope of the original risk to which the defendant subjected the plaintiff. (Prosser & Keaton, *The Law of Torts* (15th ed. 1984) §41, pp. 266, 268; §44, p. 303.) Since the later risks the Jewells' encountered were within the scope of the original risk to which the Bank subjected them, then necessarily the Bank is liable. (See, *Crystal Springs Trout Co. v. First State Bank, supra,* at 824.)

Fourth, the opinion's legal and factual analysis of the Jewells' eventual destruction is inaccurate. It is not true that a defendant is not liable if the plaintiffs' damages were "inevitable or due to unrelated causes", and the authority the opinion cites does not so hold. In addition, since the issue never came up at trial, there was minimal evidence on it; what little there was directly contradicts the opinion's statement.[12]

5. The Allegedly Internally Inconsistent Verdicts Can Be, And Should Have Been, Reconciled by the Court of Appeal.

It is the duty of appellate courts to reconcile superficially inconsistent findings. (*Brewer v. Simpson* (1960) 53 Cal.2d 567, 583; *Allen v. Sundean* (1982) 137 Cal.App.3d 216, 224.) This can easily be done in the instant case, yet the court simply flung up its hands in mock despair over its alleged inability to do so.

The jury could have found both that Sullivan, as the bank's agent, intended to the make the long-term loan, but that his superiors did not. That would still result in liability to the Bank since "a principal may be liable when he intentionally misinforms or withholds information from the agent and the agent thereupon innocently misrepresents." (*Barrett v. Bank of America, supra* at 1369-70.) Had not the court been searching for opportunities to reverse the judgment, it could have performed this simple task of reconciling the verdicts.

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[12] By taking the Jewells' deeds of trust, the Bank started a domino effect which caused the Jewells' creditors to scramble for assets; bankruptcies and lawsuits were then filed to prevent foreclosures. But for that original act of the Bank, the Jewells would not have been forced into bankruptcy.

V

CONCLUSION

For the reasons stated, this petition for review should be granted and this cause set for argument.

DATED: June 27, 1988

Respectfully submitted,

CAPPELLO & FOLEY

By: A. BARRY CAPPELLO

A. BARRY CAPPELLO
Attorneys for Respondents Charles Duck, Trustee of Bankruptcy Estate of George M. and Laura E. Jewell, and George R. Jewell

VERIFICATION

STATE OF CALIFORNIA, COUNTY OF

I have read the foregoing _____ and know its contents.

☒ CHECK APPLICABLE PARAGRAPH

☐ I am a party to this action. The matters stated in the foregoing document are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

☐ I am ☐ an Officer ☐ a partner _____ ☐ a _____ of _____

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a party to this action, and am authorized to make this verification for and on its behalf, and I make this verification for that reason. ☐ I am informed and believe and on that ground allege that the matters stated in the foregoing document are true. ☐ The matters stated in the foregoing document are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

☐ I am one of the attorneys for _____

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a party to this action. Such party is absent from the county of aforesaid where such attorneys have their offices, and I make this verification for and on behalf of that party for that reason. I am informed and believe and on that ground allege that the matters stated in the foregoing document are true.

Executed on _____, 19____, at _____ California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SANTA BARBARA

I am employed in the county of SANTA BARBARA, State of California. I am over the age of 18 and not a party to the within action; my business address is: 831 State Street, Santa Barbara, CA 93101.

On June 27, 1988, I served the foregoing document described as PETITION FOR REVIEW OF DECISION OF THE COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION ONE on_____

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